Supreme Court, U.S.
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No. 87-137

In The
Supreme Court of the United States
October Term, 1987

STEPHEN C. MORIN,

Appellant,

v.

STEVEN PETRARCA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF RHODE ISLAND

MOTION TO DISMISS

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QUESTIONS PRESENTED

I. Does the General Assembly of the State of Rhode Island have the constitutional authority to abrogate the common law cause of action for alienation of affection and criminal conversation?

II. Did the General Assembly of the State of Rhode Island deprive the Appellant of due process of law in enacting Rhode Island General Law § 9-1-42 which abolished the cause of action for alienation of affection and criminal conversation?

III. Did the General Assembly of the State of Rhode Island deprive the Appellant of equal protection of the law in enacting Rhode Island General Law § 9-1-42 which abolished the cause of action for alienation of affection and criminal conversation?

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF RHODE ISLAND

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MOTION TO DISMISS

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The Appellee, Steven Petrarca, pursuant to Rule 16.1 of the Rules of the Supreme Court of the United States respectfully requests that this Court dismiss the within Appeal from the Supreme Court of the State of Rhode Island.

—o—

JURISDICTION

Appellant has claimed that this Court has jurisdiction to review by direct Appeal the Judgment of the Supreme Court of the State of Rhode Island pursuant to the provisions of 28 U.S.C. § 1257 (2) which provides as follows:

> Section 1257. State Courts; Appeal; Certiorari.
>
> Final Judgments or Decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By Appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity.

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STATUTES INVOLVED

Appellee denies that this case involves the denial of a right protected by the Constitution of the United States and that furthermore, the Judgment of the Supreme Court of the State of Rhode Island rests on an adequate non-Federal basis.

> Rhode Island General Law § 9-1-42. Causes of action abolished.-No civil action shall be commenced or prosecuted for alienation of affection, criminal conversation or seduction, and said causes of action are hereby abolished.

———o———

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 16.1 of the Rules of the Supreme Court of the United States provides as follows:

> Within 30 days after receipt of the jurisdictional statement, unless the time is enlarged by the Court or a Justice thereof, or by the Clerk under the provisions of Rule 29.4, the appellee may file a motion to dismiss, or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss, provided that a motion to affirm or dismiss shall not be joined with any other pleading.
>
> The Clerk shall not accept any motion so joined.
>
> (a) The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules.
>
> (b) The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.
>
> (c) The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.
>
> (d) The Court will receive a motion to dismiss or affirm on any other ground the appellee wishes to present as a reason why the Court should not set the case for argument.

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STATEMENT OF THE CASE AND PROCEEDINGS BELOW

This action was initiated on April 8, 1986 in the Superior Court for the State of Rhode Island in the County of Kent. The Appellant brought a two count action alleging alienation of affection and criminal conversation. In response thereto, the Appellee filed a Motion to Dismiss pursuant to Rhode Island General Law (hereinafter "R.I.G.L.") § 9-1-42. By the clear and concise terms of R.I.G.L. § 9-1-42 and its accompanying comment, there shall be no cause of action for alienation of affection or criminal conversation in the State of Rhode Island after June 14, 1985. While the comment makes it clear that this prohibition is not to be applied retroactively to pending suits, it is just as clear that no such cause of action shall be initiated after June 14, 1985. The Appellant subsequently filed a Motion for Certification to the Supreme Court of the State of Rhode Island. On June 9, 1986, the Motion to Dismiss was granted and the Motion to Certify was denied. The Appellant timely appealed this decision to the Supreme Court of the State of Rhode Island. In accordance with Rhode Island Supreme Court Rule 16, both parties filed brief statements of their respective cases. On April 22, 1987, both parties presented oral argument to a three judge panel of the Supreme Court of the State of Rhode Island pursuant to an Order of February 16, 1987 which required the Appellant herein to appear and show cause why his Appeal should not be dismissed and denied. By order dated April 24, 1987, a mere two days after oral argument, the Supreme Court of the State of Rhode Island entered an Order dismissing and denying Appellant's Appeal stating that no cause had been shown.

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ARGUMENT

I. THE GENERAL ASSEMBLY OF THE STATE OF RHODE ISLAND CAN ABROGATE THE COMMON LAW CAUSE OF ACTION FOR ALIENATION OF AFFECTION AND CRIMINAL CONVERSATION.

This Court, as early as 1929 in *Silver v. Silver*, 280 U.S. 117, 122, 50 S.Ct. 57, 74 L.Ed. 221 (1929), held that the "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." As stated in *Carr v. United States*, 422 F.2d. 1007, 1010 (4th Cir. 1970), "[t]here has been no indication that this is not the settled law on the question". See also *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 88 n. 32, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).

By the enactment of R.I.G.L. § 9-1-42, the Rhode Island General Assembly statutorily abolished the common law causes of action for alienation of affection, criminal conversation and seduction. By the terms of *Silver v. Silver*, the only inquiry remaining should be whether this served a permissible legislative objective. There can be no question that the concepts of alienation of affection and criminal conversation are outdated and archaic. By the effective date of this statute, the vast majority of the states had already abolished this cause of action. In fact, even the Appellant in his Jurisdictional Statement admits that these "may well be anachronisms in today's society".

Is is simply a fact that due to the ever-evolving standards of society, the Rhode Island General Assembly was fulfilling a valid legislative objective in abrogating this cause of action. The only issue remaining is whether it did so in a constitutionally permissible manner.

II. THE GENERAL ASSEMBLY OF THE STATE OF RHODE ISLAND DID NOT DEPRIVE THE APPELLANT OF DUE PROCESS OF LAW IN ENACTING RHODE ISLAND GENERAL LAW § 9-1-42 WHICH ABOLISHED THE CAUSE OF ACTION FOR ALIENATION OF AFFECTION AND CRIMINAL CONVERSATION.

The Fourteenth Amendment to the United States Constitution provides that no state shall deprive a person of "life, liberty, or property without due process of law". In this case, the Appellant claims that the accrual of his cause of action caused him to be vested with certain property rights which were taken away by the State without due process of law.

The Appellant advances two theories in support of his position that he was deprived of his property without due process of law. To begin with, the Appellant contends that the accrual of his cause of action vested in him certain rights which cannot be abridged without due process. Secondly, the Appellant contends that an accrued cause of action is a property interest worthy of due process protection.

In support of his contention that the accrual of his alienation of affection cause of action caused him to be vested in that action, Appellant relies primarily upon *Campbell v. Holt*, 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483 (1885). Appellant cites this case in support of the proposition that a present fixed interest should be protected from arbitrary state action. Appellant then proceeds to describe how the Court has used the vested rights analysis found in *Campbell v. Holt* to strike down various state actions. However, the Appellant's reliance is misplaced. Decisions which have invoked the vested rights analysis have involved rights vested in real property, contract, or in some other

fixed sum of money. These present fixed interests were said to stand independent of the statute that created them and could not be abridged by subsequent statute. *See, e.g., Ettor v. Tacoma,* 228 U.S. 148, 156, 33 S.Ct. 428, 57 L.Ed. 773 (1912).

Alienation of affection and criminal conversation are intentional torts. K. Kavanagh, *Alienation of Affections and Criminal Conversations: Unholy Marriage in Need of Annulment,* 23 Ariz. L. Rev. 323, 324 (1980). None of the cases relied upon and cited by Appellant hold that a right arising or deriving from a tort is a vested right. In fact, the Court in *Ettor v. Tacoma* expressly distinguished an action for an injury to property from an action based upon a tort.

Finally, this Court has consistently held that a property right is not created by rule of the common law. As stated by the Court in *Duke Power Co. v. Carolina Env. Study Group,* 438 U.S. 59, 88 n. 32, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978):

> Our cases have clearly established that "a person has no property, no vested interest, in any rule of the common law". *Second Employer's Liability Cases,* 223, U.S. 1, 50 (1912), quoting *Munn v. Illinois,* 94 U.S. 113, 134 (1877). The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object," *Silver v. Silver,* 280 U.S. 117, 122 (1929), despite the fact that "otherwise settled expectations" may be upset thereby. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 16 (1976).

Since the Appellant cannot have a vested interest in a tort claim, and since the Appellant cannot have a vested interest in the common law rule of law, the Appellant is in

essence asking this Court to find that he had a vested interest in his former wife's affections. For the same reasons that the cause of action for alienation of affection and criminal conversation are no longer favored in our society, it is obvious that this claim cannot succeed.

The Appellant's second due process argument is that an accrued cause of action creates a property interest worthy of protection under the Fourteenth Amendment. The Appellant relies upon *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). However, upon closer examination, it can be seen that neither of these cases embraces Appellant's proposal.

As previously stated, an action for alienation of affection and criminal conversation is a tort action. Neither *Mullane v. Central Hanover Bank & Trust Co.*, nor *Logan v. Zimmerman Brush Co.* involved a tort claim. *Mullane v. Central Hanover Bank & Trust Co.* involved notification of a trustee settlement of a trust while *Logan v. Zimmerman Brush Co.* involved the right to redress discrimination. Both cases involved the procedural exclusion of an individual from an entitlement which was then in existence. In this case, the Rhode Island General Assembly has simply abolished a cause of action. There is no entitlement from which the Appellant is being excluded. As such, procedural due process should not apply.

This is not to say that this Court has ruled that a cause of action sounding in tort can never be viewed as property protected by the Fourteenth Amendment. In *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481

(1980), it was held that a cause of action for wrongful death is arguably a species of property protected by the Due Process Clause. This case is instructive as to the standard of review applicable to a state's action in abolishing a cause of action. As Mr. Justice Marshall explained in his concurring opinion in *Pruneyard Shopping Center v. Robbins,* 447 U.S. 74, 92, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980), "[e]ven if a pre-existing state law remedy is a species of property protected by the Due Process Clause . . ., it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational."

As indicated, the Appellant must demonstrate that the actions of the Rhode Island General Assembly in abolishing the cause of action for alienation of affection and criminal conversation were wholly arbitrary or irrational. In other words, since the State of Rhode Island has a paramount interest in fashioning its own rules of tort law, the Appellant must demonstrate that the actions of the General Assembly in abolishing this cause of action were arbitrary or irrational to the extent that they were not reasonably related to the legitimate government purpose which was the abolition of this cause of action. The Appellant simply cannot meet this burden. As has already been discussed, the concept of alienation of affection and criminal conversation is outdated and archaic. The Rhode Island General Assembly, by taking the action that it did, had recognized this fact and was simply responding to the changing needs of society.

III. THE RHODE ISLAND GENERAL ASSEMBLY DID NOT DEPRIVE THE APPELLANT OF EQUAL PROTECTION OF THE LAW BY ENACTING RHODE ISLAND GENERAL LAW § 9-1-42 WHICH ABOLISHED THE CAUSE OF ACTION FOR ALIENATION OF AFFECTION AND CRIMINAL CONVERSATION.

The Appellant contends that R.I.G.L. § 9-1-42 violates the Equal Protection Clause of the United States Constitution because it classifies similarly situated people in different manners. The Appellant argues that the classification has no rational relationship to any legitimate state goal and should therefore be struck down.

The level of scrutiny to be used in this matter focuses on whether the disparate treatment rationally furthers legitimate objectives of state law. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 17, 93 S.Ct. 1278, 1288, 36 L.Ed.2d 16 (1973). This is because no fundamental right and no suspect classification is involved. *Pottratz v. Davis,* 588 F.Supp. 949, 955 (D.Md. 1984). The rational relationship standard of review reflects the judiciary's awareness that "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation". *Ferguson v. Skrupa,* 372 U.S. 726, 729, 83 S.Ct. 1028, 1030, 10 L.Ed.2d 93 (1963). In other words, since this alleged classification does not penalize the exercise of any constitutional right, and since it does not create a suspect classification nor involve a fundamental interest, the alleged classification need not be justified by a compelling governmental interest. *Carr v. United States,* 422 F.2d. 1007, 1010 (4th Cir. 1970). Thus, a rigorous standard of review would be inappropriate. Rather, the alleged statutory classification comes with a presumption of constitutionality and it "will not

be set aside if any state of facts reasonably may be conceived to justify it''. *McGowan v. Maryland,* 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961).

The Rhode Island General Assembly in enacting R.I.G.L. § 9-1-42 was simply abolishing an archaic cause of action. The General Assembly recognized that the concepts of alienation of affection and criminal conversation are anachronisms in our society and took the necessary action. In seeking to abolish these causes of action as speedily as possible, the General Assembly simply ruled that no such causes of action could be initiated after the effective date of this legislation. Any classifications which this legislation might have created only furthered the stated legitimate legislative purpose.

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CONCLUSION

The Appellant has neither presented any substantial federal questions, nor has he successfully demonstrated that the actions of the Rhode Island General Assembly in enacting R.I.G.L. § 9-1-42 deprived him of equal protection or due process of law. The Rhode Island General Assembly was acting within its constitutional powers in abrogating the common law cause of action for alienation of affection and criminal conversation. This was a valid legislative object which was fulfilled in a constitutionally permissible manner.

For the reasons hereinabove cited, Appellee Steven Petrarca respectfully requests that this Court dismiss the instant Appeal.

Respectfully Submitted,

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